

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

3 OSEN LLC,

4 Plaintiff,

5 v.

17 CV 4457 (KPF)

6 UNITED STATES CENTRAL COMMAND,

7 Defendant.

8 -----x

New York, N.Y.  
November 9, 2017  
5:30 p.m.

10 Before:

11 HON. KATHERINE POLK FAILLA,

12 District Judge

13 APPEARANCES

14 OSEN LLP

15 Attorneys for Plaintiff

16 BY: MICHAEL JACOB RADINE

WILLIAM ADAM FRIEDMAN

17 UNITED STATES ATTORNEY'S OFFICE, SDNY

Attorneys for Defendant

18 BY: ANDREW EDWARD KRAUSE

1 (Case called)

2 THE DEPUTY CLERK: Counsel, please identify yourselves  
3 beginning with the plaintiff.

4 MR. RADINE: Good afternoon, your Honor. Michael  
5 Radine from Osen LLP.

6 MR. FRIEDMAN: Good afternoon, your Honor. William  
7 Friedman of Osen.

8 THE COURT: Good afternoon to both of you.

9 Could you just let me know, please, to whom I should  
10 be directing my attentions.

11 MR. KRAUSE: Good afternoon, your Honor. Andrew  
12 Krause for the U.S. Attorney's Office.

13 THE COURT: You are all welcome. I'm very interested  
14 in the case. And the joint letter, and I understand the  
15 parties' proposed schedule which makes sense to me, but this is  
16 a case in all candor, very different from other cases that I  
17 have. So I'd like to hear a little bit more about the factual  
18 background.

19 Mr. Radine, if I could just begin -- I think I  
20 understand what this case is about, because I read the  
21 complaint and all the materials, but I really want to make sure  
22 I understand it.

23 If you could just give me the cliff notes version of  
24 what it is you're trying to do.

25 MR. RADINE: Sure. Thank you, your Honor.

1           Our firm represents hundreds of U.S. soldiers and  
2 family members of U.S. soldiers who are killed or injured in  
3 terrorist attacks while serving in Iraq. We bring civil claims  
4 on their behalf against Iran which supported these terrorist  
5 attacks and is responsible for them, along with certain  
6 corporations that we allege helped Iran do that.

7           The first step in bringing these claims is attributing  
8 each terrorist attack to Iran. There are a few ways of doing  
9 it. One way is the use of a particular weapon, the explosively  
10 formed penetrator, EFP.

11           When it's found in Iraq, it's a signature weapon of  
12 Iranian involvement. It's a notorious weapon dating back to  
13 about World War II. It's sort of a sophisticated type of  
14 improvised explosive device.

15           High explosives packed into it explode in a trigger,  
16 and it fires a copper lining that as it's fired out, forms a  
17 slug that weighs several pounds, travels about a mile a second,  
18 and simply cuts right through an armored vehicle causing  
19 horrible, devastating damage to the men and women inside those  
20 vehicles.

21           It had a big role to play in Iraq and Afghanistan  
22 against our troops. It's been the subject of countless public  
23 government reports, press conferences, press releases, and  
24 nongovernmental news stories, articles, academic research,  
25 books, and so on. Their effect and how they work are

1 well known. There are patents for them that are publicly  
2 accessible and so on.

3 For us to show that an EFP was used in a particular  
4 attack, we used, among other things, investigatory documents  
5 prepared by the military. So, after an attack occurs in Iraq,  
6 the military then arrives on scene. They investigate. They  
7 take pictures of the damaged vehicle. They write up their  
8 findings, and these reports, including their findings and these  
9 pictures, are often stored at U.S. Central Command.

10 So, to get these documents, we made FOIA requests for  
11 them to U.S. Central Command, after receiving what we felt was  
12 insufficient production, we brought the suit.

13 Since the commencement of it, I have to say both Cen.  
14 Comm. and especially Mr. Krause, have been exceedingly helpful  
15 in locating documents for us and producing documents. It's an  
16 ongoing process, and we're sharing additional terms to help  
17 them locate more documents and so on. We're hopeful that will  
18 lead to eventually a full production.

19 THE COURT: Or at least something that doesn't require  
20 additional litigation before me. Perhaps I'm just speaking  
21 from this side of the bench. I understand.

22 In terms of the request that you're making, Osen is  
23 able to make these simply as an entity? Can it just make these  
24 FOIA requests? Or is it your representation of the individuals  
25 who were effected by these matters who are family members of

1 servicemen or I guess injured servicemen? How is it that you  
2 get the standing to bring this? Is it simply because you  
3 yourself, your firm, can make a FOIA request?

4 MR. RADINE: That's right.

5 THE COURT: So, even if you were not representing  
6 these individuals, you would be able to make these same  
7 requests?

8 MR. RADINE: Correct, your Honor.

9 THE COURT: And the schedule that you've given me  
10 seems aggressive but doable.

11 So is it your expectation that you and the government  
12 and Cent. Comm. Will be able to work out differences? Are  
13 there differences right now?

14 MR. RADINE: There is one other difference, aside from  
15 the scope of production, which, as I said, hopefully we'll be  
16 able to work out, and that relates to redactions that Cent.  
17 Comm. has made in the documents that they've produced so far.

18 The redactions we don't contest all relate to the  
19 privacy of individuals and so on. But the redaction of  
20 interest to us is primarily redactions showing the damage  
21 caused by the EFP when it struck and penetrated into the  
22 vehicle. These are sometimes called strike points, and they  
23 help show that an EFP is what in fact hit the vehicle and what  
24 in fact caused the injuries therein.

25 Prior to the production to us, we've understand this

1 as public knowledge, how EFPs penetrate armor, how they hit  
2 armor. In a production that Cent. Comm. made to a different  
3 requestor but relating to one of the attacks that we made a  
4 request for, they made a production of all the relevant  
5 documents with no redaction to strike points whatsoever.

6 To us they've redacted some of these images, but even  
7 then, it's been very inconsistent. Of the 2,000 odd pages they  
8 produced to us so far, there are maybe -- and I'm estimating --  
9 a couple hundred photos of vehicular damage. Of those, a  
10 significant portion -- again, I'm estimating. Maybe  
11 30 percent -- of the image of the EFP strike point is not  
12 redacted.

13 In other cases, the redaction is not of what seems to  
14 us to be the material information such as the actual hole with  
15 the daylight coming through it which seems to us  
16 straightforward what an EFP does.

17 In some cases, they produced the same image twice.  
18 Some of our requests overlap. In one case, the image is  
19 redacted. In another, it's not. There are other examples. I  
20 won't belabor the Court.

21 In some cases, they redacted information of minority  
22 at the time. They redacted the word "copper," which is  
23 important. It indicates that a copper lined EFP was used.  
24 I'm estimating maybe 20 percent of the time the word would  
25 appear unredacted in the very next paragraph or on the next

1 page.

2 So these redactions -- there are two issues. One is  
3 the issue of whether it's withholding any information that has  
4 national security value to begin with.

5 Again, these weapons are well known. The armor is not  
6 particularly sophisticated armor. We're talking bold steel,  
7 ballistic glass. These aren't things that our enemies or the  
8 public have any challenge of learning about. There is nothing  
9 exotic here.

10 The extent to which this is important to Cent. Comm.  
11 in which they've disclosed these images to others, both in the  
12 FOIA context and in press releases and then disclosed them to  
13 us in dozens of these images, the result is that the redactions  
14 don't keep our troops any safer. The redactions don't keep  
15 this information from our enemies.

16 What they do is they keep the information that's  
17 specific to our clients that relates to the attacks that they  
18 were in away from our clients who are the only party really  
19 affected by these redactions.

20 We've sent this information, some examples, to  
21 Mr. Krause. I know he's passed them on to Cent. Comm.  
22 Hopefully they'll be able to work out something along those  
23 lines, and hopefully they'll give it some more thought, but  
24 that's our current concern, these redactions.

25 THE COURT: Thank you very much.

1 Is there anything else would you like me to know, sir?

2 MR. RADINE: I think that's it for the moment. The  
3 documents they produced have other helpful evidence, and we  
4 have other evidence showing that these EFPs were used in these  
5 attacks, but more evidence is helpful to us, especially with  
6 the number of clients involved in these attacks. So it's  
7 always helpful.

8 THE COURT: Thank you.

9 Mr. Krause, I'd be happy to hear from you and your  
10 client. I'd be interested in the government's perspective with  
11 respect to the production of documents. I do understand if at  
12 this time you and your client are still working through or  
13 coming to a final decision about how and the extent to which  
14 you'll be producing this material.

15 MR. KRAUSE: That's correct, your Honor. The search  
16 process is ongoing. As Mr. Radine indicated, we've had a very,  
17 I think, productive and collaborative, iterative process of  
18 locating documents, going back, doing additional searches,  
19 sometimes based on additional information that's been provided  
20 by counsel that has yielded additional results in Cent. Comm.'s  
21 queries of its various databases. So that process is still  
22 ongoing.

23 We have a production that we anticipate making based  
24 on the schedule that we've laid out before Thanksgiving which  
25 will be another 900 pages or so, which is really another



1 50 percent increase above and beyond what we've produced so  
2 far.

3 So documents are being located, and we're hopeful that  
4 we'll be able to at least deal with the adequacy of the search  
5 aspect of the case without need for further litigation.

6 It is possible ultimately that we may not locate all  
7 of the documents that counsel is looking for, but we will have  
8 further discussion about that and determine whether any  
9 briefing needs to be pursued on those issues.

10 With respect to the withholdings, that's something  
11 that we are sort of just starting to explore. Some of these  
12 additional examples that Mr. Radine has been provided have been  
13 provided in the last week or two. I have passed those along to  
14 my client.

15 With respect to one, I've recently learned of one  
16 example where Cent. Comm. did release information in response  
17 to a different FOIA request. My understanding currently is  
18 that the vehicle that was depicted in that image is an older  
19 type of vehicle that's not currently in use in the theater  
20 anymore. So that may have had a role in terms of what was and  
21 wasn't withheld.

22 As far as inconsistency in terms of what has been  
23 produced, certainly we'll take a look at those. I don't know  
24 that we've been provided with specific examples of those, but  
25 we'll do our best to reconcile those issues.

1 As a general matter, I think that Cent. Comm. is  
2 concerned with ensuring that it doesn't provide information  
3 that could give adversaries against the United States any  
4 information about vulnerabilities in the vehicles that have  
5 been subject to the attacks.

6 That's fundamentally the purpose for the  
7 classification determination, and those classification  
8 determinations are pursuant to classification guides that are  
9 used routinely at Cent. Comm.

10 If we needed to brief those issues, that would  
11 essentially be the basis of the argument. We'll see how many  
12 of those issues remain after we go through what I hope will be  
13 another productive process to narrow the scope of those  
14 considerably.

15 THE COURT: Now, I'm not asking you to change the  
16 schedule that you've given me, but by the same token, I don't  
17 want to have a situation where I'm getting monthly requests for  
18 extensions because, despite everyone's best efforts, these  
19 materials could not be produced.

20 This is our initial pretrial conference, and normally,  
21 if you want to call what you're doing as fact discovery, I  
22 would normally give the parties approximately four months to  
23 get fact discovery done.

24 Is it your belief, Mr. Krause, that -- what I'm saying  
25 is all additional responsive documents will be released on or

1 before the 22nd of December.

2 Is that doable, sir?

3 MR. KRAUSE: I don't think we say "all," your Honor.

4 THE COURT: I did put that word in there. I thank  
5 you. Why I say that is because there is a meet-and-confer and  
6 remaining issues in January that sort of presupposes that all  
7 but the withheld ones will be perused.

8 Am I mistaken?

9 MR. KRAUSE: I don't think that is necessarily the  
10 case. We have this set of 900 documents that will be produced  
11 by November. At this point, there are two sort of principal  
12 buckets, if you will, of additional documents.

13 One is a set of documents from a database that's known  
14 by the letters CEXC. That database has been queried.  
15 Documents have been located. Cent. Comm. is in the process of  
16 extracting documents from that database. They're having some  
17 difficulty doing that for various technical reasons.

18 I'm not sure what the volume of documents will be from  
19 that data base. There will be additional documents. We expect  
20 or hope at least that we will be able to produce some or all of  
21 those documents by the December deadline.

22 Based on recent discussions with counsel, we have an  
23 additional 20 or so -- I think it's 19 referred to in the  
24 letter -- incidents for which we are conducting additional  
25 searches based on information that's been provided. Those

1 searches are ongoing, and we hope to have by next week a sense  
2 of the volume of additional materials that would be responsive,  
3 based on those searches.

4           Depending on what the volume is, I'm not sure whether  
5 we'll be able to produce those all by December 22. It would be  
6 our hope to do that, but if it turns out to be an additional  
7 8,900 pages of documents, it may not be possible to do all 900  
8 pages in that timeframe because of the redaction issues  
9 involved.

10           There is also the additional category which is briefly  
11 alluded to in the letter of what we're referring to as casualty  
12 report documents.

13           THE COURT: Yes, sir.

14           MR. KRAUSE: These are documents -- as I understand  
15 plaintiffs' position, we've produced a couple of these as  
16 exemplar documents to see if these are documents that counsel  
17 are interested in and needs to have for purposes of its ongoing  
18 litigation.

19           We're prepared to produce those, but they're  
20 voluminous, and the types of redactions involved there are  
21 somewhat painstaking because they include lots of different  
22 names, not necessarily names of decedent's which wouldn't be  
23 subject to withholding under FOIA but names of other active  
24 military duty personnel who are involved, for example, in  
25 evacuation of the service member or treatment of the service

1 member at a different hospital or military base. So there need  
2 to be a lot of different redactions there in order to withhold  
3 personally identifiable information.

4 We're involved in a process to try to figure out if  
5 there are ways to expedite the processing and release of those  
6 documents. We haven't necessarily provided for a production  
7 timetable for those here, but I actually am hopeful that the  
8 redactions in those documents wouldn't necessarily be issues  
9 that would have to be presented to the Court.

10 I don't think they're going to be issues that we can  
11 dispute because of the nature of the documents and the nature  
12 of the redactions. The one thing that we've briefly talked  
13 about is that when we have that meet-and-confer in January,  
14 proposing an additional schedule which at that point I think  
15 would allow us to propose a final production schedule and  
16 potentially, depending on where we are with things, with the  
17 Court's permission, set a briefing scheduling to deal with  
18 whatever substantive issues remain, even as Cen. Comm. is  
19 producing the casualty report documents so we don't necessarily  
20 delay the resolution of the substantive issue with respect to  
21 the withholding for the production of the casualty report  
22 documents which probably will not impact the withholding issue.

23 THE COURT: So I should expect a similarly detailed  
24 schedule in or about January.

25 MR. KRAUSE: Right. Our hope is that that will be the

1 last schedule, that we'll comply with the schedule as proposed.

2 I don't think we should need any extensions of those dates.

3 Then we propose the final schedule in January, which  
4 my hope would be a final production schedule as well as a  
5 briefing schedule for whatever issues need to be briefed at  
6 that point.

7 THE COURT: Let me just confirm with plaintiffs'  
8 counsel that you have that same understanding.

9 MR. RADINE: That's right, your Honor.

10 THE COURT: That is fine. For me, there is no case  
11 management plan to endorse. What I would do instead would be  
12 to endorse the schedule in your joint letter to me of the 2nd  
13 of November and then, for my own notes, just diary my schedule  
14 to anticipate receiving in or about the second half of January  
15 a second schedule and hopefully final schedule for the  
16 production of documents which may, as needed, include a  
17 schedule for briefing.

18 Am I correct?

19 MR. RADINE: Yes, your Honor.

20 THE COURT: Sounds great. Let me commend you for  
21 playing so nicely together but also for being so detailed in  
22 your communications with me.

23 I'm happy to let you handle the administration or sort  
24 of the progress in this case because you don't need my  
25 supervision, and it's the rare case when I can say that. So I

1 am thankful to you for being so self-sufficient. I will look  
2 forward to your letters in January.

3 I'll ask, Mr. Krause, if you could, please just order  
4 a transcript of this conference so that we have it on record.

5 With that, unless anyone has anything else to add,  
6 we're adjourned.

7 Anything else? No. Okay. Thank you very much for  
8 coming in.

9 MR. KRAUSE: Thank you, your Honor.

10 MR. RADINE: Thank you, your Honor.

11 MR. FRIEDMAN: Thank you, your Honor.

12 (Adjourned)  
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